IN THE MICHIGAN SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

MARTIN B. BREIGHNER III &
KATHRYN BREIGHNER,

SC #123529

Plaintiffs/Appellants

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION INC., a Michigan non-profit corporation,

Defendant/Appellee.

REPLY BRIEF - APPELLANTS

Wayne Richard Smith (P20716)
Attorney for Plaintiffs/Appellants
365 E. Main Street
P.O. Box 4677
Harbor Springs, Michigan 49740
231.526.1684

TABLE OF CONTENTS

INDEX OF AUTHORITIES

INTRODUCTION

Appellant files this Reply Brief as authorized by MCR 7.212 (G) to point out the several factual and legal peculiarities in Appellee's Brief and to re-emphasize the reality that the Michigan High School Athletic Association is a public body for purposes of the Freedom of Information Act

APPELLEE'S COUNTER STATEMENT OF FACTS RECITES FACTS WHICH ARE NOT A PART OF THE RECORD

A. Facts Giving Rise to the Complaint

None of the "facts" stated in this section of Appellee's Brief were part of the record before the trial court or the Court of Appeals. with the exception of the agreed upon fact that Jordan Breighner, son of Appellants, was a student at Harbor Springs High School and competed as a member of its ski team in the 2000-2001 season.

Appellee misses the entire point - this case is not about the MHSAA's disqualification of Jordan Breighner. It is about the MHSAA's refusal to answer Appellants' Freedom of Information Act request.

Appellants respect the primacy of the MHSAA in the regulation of secondary school interscholastic sports and accept its declaration of Jordan's ineligibility. Neither Jordan nor the Appellants made any effort to change or overturn the MHSAA's ruling that Jordan was ineligible to compete in the state ski tournaments. They simply wanted to know why Jordan was disqualified and what criteria were used to determine that the race he had competed in at Searchmont, Ontario was not sanctioned. (Appellants' Appendix, Page 10a.)

Only after the Harbor Springs High School principal stated that the school did not have that information did Appellants request it of the MHSAA, who immediately took the position that it did not have to furnish any such information to Appellants claiming that it was not a "public body" but a private non-profit corporation and thus not required to comply with the FOIA.

The foregoing recites all the relevant facts which gave rise to the Complaint. These facts have very little to do with Jordan Breighner. They have everything to do with the MHSAA.

B. Facts Relating to the MHSAA

Again, most of the "facts" recited in this section of Appellee's Brief were not a part of the record before either the trial court of the Court of Appeals and are in any event self serving and irrelevant.

The only facts set forth in this section which are a part of the record before the lower courts are the agreed upon fact that the MHSAA is a Michigan private non-profit voluntary membership corporation and derives 90% of its revenues from ticket sales to post season tournaments held under the auspices of the MHSAA. (At oral argument in the trial court, Appellee's counsel stated the figure at 95%.)

All of the other recitations of so-called "fact" are a mixture of irrelevant material not a part of the record or legal argument. Nowhere in Appellee's Counter Statement of Facts can one find any reference to any part of the record.

APPROXIMATELY ONE-HALF OF APPELLEE'S "COUNTER STATEMENT OF FACTS" SETS FORTH NO FACTS BUT CITES AND ARGUES LAW

Pages 7-11 inclusive of Appellee's Brief purport to be a continuation of its "Counter Statement of Facts", but not a relevant fact is recited. Instead, these five pages cite and argue law to which a response is required.

For example, Appellee says that the MHSAA is a 501 (c) (3) organization for purposes of the Internal Revenue Code. This is not a part of the record below and is utterly irrelevant . It is agreed that MHSAA is a private non-profit corporation. Appellant has no quarrel with that fact and it is unnecessary to cite Attorney General Opinions and the Court of Appeals to that effect. Appellee also cites the Attorney General as authority for the proposition that the MHSAA is not subject to the Open Meeting (sic) Act. The present case is about the Freedom of Information Act, not the Open Meetings Act. Different and distinct definitions of "public body" are contained in each Act. Regardless, Appellee does not even attempt to tie the Attorney General's Opinion that the MHSAA is not subject to the Open Meetings Act to the Freedom of Information Act, leaving the reader completely in the dark.

Appellee goes on to state that *"There is no governmental oversight of the MHSAA by any branch or agency of state government."* Of course, the FOIA, by its terms applies to local governmental agencies as well, including school boards and Appellee fails to explain the reason why the Superintendent of Public Instruction or his/her designee is by legislative fiat still an ex officio member of the MHSAA representative council.

The "Counter Statement of Facts" then criticizes the dissenting opinion in the Court of Appeals stating that it was in error because schools and school sports have no money-making capacity. This is positively disingenuous - Appellant thought it was stipulated that the MHSAA receives 90 -95% of its funding from ticket sales to school athletic tournaments where student athletes perform and people pay to see them perform. Maybe the schools lose money because so much of it must be paid to the MHSAA.

The point is that if all the schools in Michigan decided that athletics should be de-emphasized and that they would no longer compete in post-season tournament play, the MHSAA would go broke. No longer would it be subsidized by proceeds from school athletic tournaments.

I.

WHETHER THE MHSAA IS AN AGENT OF ITS MEMBERS

Appellee claims that the school districts have no right to control the MHSAA in spite of its admission in the pleadings that its members *"control (its) policies, conduct and activities"* . With apologies to Gertrude Stein, control is control is control, especially when it is admitted.

Appellee agrees that the school districts cannot legally delegate their authority to regulate interscholastic athletics.

Appellee does not explain or even attempt to explain the relationship between the schools and the MHSAA in light of this Court's decision in Kirby v. MHSAA (1998) 459 Mich. 23, 585 NW 2d 290 in which this Court found that *"...these schools cede to*

the MHSAA full authority to regulate interscholastic athletics." and that the MHSAA has *"no independent authority over schools or students".* The regulatory authority that is enjoyed by the MHSAA is a governmental function completely derived from the schools who *"can and should exercise appropriate oversight of the MHSAA".* (Kirby, *supra*)

Quite simply, this describes an agency relationship.

As this Court has stated, in determining whether an agency has been created, a court is to consider:

> *"the relations of the parties as they in fact exist under their agreements or acts."* (emphasis supplied)

St. Clair Intermediate School District v. Intermediate Education Association/MEA 458 Mich. 540, 581 NW 2d 707 (1998)

While the schools cannot delegate their governmental powers, the legislature has said that they can join an organization, agree to abide by its rules and regulations and enforce the organization's rules and regulations. The rules and regulations affecting its members are made or adopted by the MHSAA representative council (board of directors) composed almost exclusively of public school member representatives. As a condition of membership, members must agree to be bound by and enforce the rules and regulations their own people have enacted. To say that the schools and the MHSAA are joined at the hip is an understatement. To say that its member schools have no control over the MHSAA is a fallacy.

II.

WHETHER THE MHSAA IS A BODY CREATED BY STATE OR LOCAL AUTHORITY

Appellee makes three contradictory assertions:

1. *"By its very language, the Act (FOIA) does not purport to apply to private non-profit corporations."*

2. *"It is clear that otherwise private organizations may be subject to FOIA coverage under circumstance specified in M.C.L. 15.232 (d) (iv.)"*

3. *"The MHSAA does not argue that a private organization cannot be subject to FOIA."*

Accepting the last proposition at face value, this case must proceed upon the basis that a private, non-profit corporation can fit within the definition of a "public body" for purposes of the Freedom of Information Act.

On page 18 of its Brief, Appellee sets forth nine " relevant facts" which it claims prove that the MHSAA was not created by state or local authority.

At least two of these "facts" bear scrutiny. Appellee states that ("fact" #6 p. 18) *"no public powers are possessed or exercised by the MHSAA"* and that ("fact" #9, p. 18) *"no governmental institution exercises oversight over the MHSAA"*.

All along, it has been assumed that *"public powers"* are governmental powers that the public schools have over education, including athletics. Richards v. Birmingham School District 348 Mich 490, 83 NW 2d 643 (1957). This appears to be the law. Although Richards is a governmental immunity case, it remains solid law that public education is a governmental, not a proprietary function.

Since the schools have ceded *"full authority to regulate interscholastic athletics"* to the MHSAA, (Kirby, *supra*), ordinary logic tells us that the MHSAA exercises public governmental powers when it rules and regulates sports activities.

It also seems that public schools are *"governmental institutions"*. Perhaps such an assertion is open to challenge but we doubt it. This Court has clearly stated in the past that the schools *"can and should exercise appropriate oversight of the MHSAA..."*. Since the schools are governmental institutions and can exercise oversight over the MHSAA, it seems that Appellee's "fact"# 9 is false. Certainly Appellee is not saying that the schools are not doing their job.

These inconsistencies in Appellee's arguments aside, the truth is that the MHSAA is a creature of its members existing for only one reason - to exercise regulatory authority over secondary school interscholastic athletics. The MHSAA was created for that purpose, first by the legislature and forty- eight years later by signatories of its Articles of Incorporation, who did so on the schools' behalf as the schools have control over interscholastic athletics and have the responsibility for organizing them or for locating an organization to act on their behalf to whom they "cede authority" and over whom "can and should" exercise oversight.

III.

WHETHER THE MHSAA IS PRIMARILY FUNDED THROUGH STATE OR LOCAL AUTHORITY

Certainly the MHSAA is primarily funded by revenues derived from the sale of tickets to post-season athletic tournaments sponsored by the MHSAA and featuring the student-athletes of MHSAA member schools. There is no doubt whatever about that.

These ticket sale revenues are obviously obtained by the MHSAA "through" local authority - the schools. There would be no revenues if there were no tournament games between the schools' athletic teams, but since there are tournament games between the schools' athletic teams, sufficient revenues come into existence to subsidize the MHSAA.

The allocation of tournament gate receipts generated by the schools to the MHSAA thus subsidizes the MHSAA, enabling it to carry on its operational and regulatory functions. Without this source of money flowing from the schools, the MHSAA is nothing. Common sense strongly dictates that the MHSAA is funded through the schools.

The next question is whether or not the funds the MHSAA derived from tournament gate receipts amount to fee for service income. Appellee would characterize this type of funding as fee for service but does not really say why. Appellee seems to believe that the revenues derived from tournament ticket sales really belong to Appellee in the first instance without regard to the fact that the revenue is generated by the schools and is largely collected by the schools and later transferred.

The majority of the United States Supreme Court in Brentwood Academy v. TSSAA 531 US 288, 12 S. Ct. 924, 148 L Ed. 2d 807 (2001) found that a similar funding arrangement in Tennessee was not a fee for service arrangement:

"Unlike mere public buyers of contract services whose payments for services rendered do not convert the service providers into public actors, (citation omitted) the schools here obtain membership in the service organization and give up sources of their own income to their collective association. The Association thus exercises the authority of the predominantly public schools to charge admission to their games. The Association does not receive this money from the schools, but enjoys the schools' money-making capacity as its own."

Appellee argues that the schools are merely custodians, passing through monies that belong to the MHSAA . Appellee ignores the truth that this is not money coming to a custodian. It is money generated by the schools which would not exist without them

RELIEF REQUESTED

Plaintiffs/Appellants again request this Court to reverse the Court of Appeals, re-instate the order of the Emmet County Circuit Court and order the Defendant/Appellee to furnish the information heretofore requested under the Freedom of Information Act.

Date: February 20, 2004

Respectfully submitted,

Wayne Richard Smith (P20716)
Attorney for Plaintiffs/Appellants
365 E. Main Street
P.O. Box 4677
Harbor Springs, Michigan 49740
Telephone: 231.526.1684